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Supreme Court, U.S.
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No. 99-1978

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR RESPONDENTS

STEVEN S. ROSENTHAL
DOUGLAS A. TUCKER
NOEL J. FRANCISCO
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, NW
Washington, DC 20005
(202) 220-9600

W. STEPHEN SMITH*
VICTORIA A. TOMLINSON
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1500
*Counsel of Record

ELLEN E. DEASON
Associate Professor of Law
University of Illinois
504 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-1286

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether Article III, Section 1 of the Constitution of the United States permits Congress to reduce judicial compensation through the imposition of a new tax that places a discriminatory economic burden on sitting Article III judges.

2. Whether a diminution in the compensation of a limited class of Article III judges in violation of Article III, Section 1 of the Constitution of the United States is remedied by a subsequent increase in the salaries of a wider class of federal employees that was granted for purposes other than to remedy the unconstitutional diminution.

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BRIEF FOR RESPONDENTS

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Three additional statutory provisions involved in this case, the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (Adjustment Act), Pub. L. No. 98-168, §§ 201-08, 97 Stat. 1105 (1983), the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 1059 (1984), and the Federal Employees' Retirement System Act of 1986 (FERS Act), Pub. L. No. 99-335, 100 Stat. 514 (1986), are set forth at 5 U.S.C. 8331 note and in the Appendix to the Brief for Respondents In Opposition to Petition for Writ of Certiorari (Opp. App. 1a-20a).

COUNTER-STATEMENT OF THE CASE

The Constitution of the United States provides that the compensation of Article III judges "shall not be diminished during their continuance in office." U.S. Const. art. III, § 1. This provision "is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). For this reason, "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation . . . ." *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933).

Recognizing this duty, a group of sixteen Article III judges brought this action against the United States of America. The judges claimed that the United States diminished their compensation in violation of Article III of the Constitution by subjecting their salaries to the Medicare hospital insurance tax in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), and to the old-age and survivors' disability insurance tax in the Social Security Amendments of 1983 (1983 Amendments), Pub. L. No.

98-21, 97 Stat. 65 (1983), and three related statutes, Opp. App. 1a-20a (collectively, the Social Security Amendments).

This case is now in its twelfth year of litigation. In 1996, this Court entered an order affirming the Federal Circuit's judgment that the enactment of the statutes at issue unconstitutionally diminished the compensation of sitting Article III judges. Since that time, the Respondents and other affected judges have relied on the Court's order as a final determination of the liability question. On remand, the only remaining issue was the quantum of damages owed to the judges. While the government claimed that the judges were entitled to no (or minimal) damages, the *en banc* Federal Circuit unanimously disagreed. The government now seeks reversal of that decision, principally on the ground that the Court should reconsider the 1996 affirmance of the Federal Circuit's judgment on liability.

1. In the early 1980s, Congress became concerned about the integrity of the Social Security old-age, survivors and disability (OASDI) and Medicare hospital insurance (HI) programs (collectively, Social Security). The National Commission on Social Security Reform (Greenspan Commission) was established to study this problem and make recommendations about how to strengthen the programs. *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 18, 1981). At the time the Greenspan Commission was established, over 90 percent of the country's 2.7 million federal civilian employees, including federal judges, did *not* participate in Social Security. *See* 42 U.S.C. 410(a)(6)(A) (1982); J.A. 41. Federal judges, along with the vast majority of other federal civilian employees, had been exempted from OASDI by the Social Security Act of 1935 because they were already "covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1982). Participation in the HI program was generally tied to participation in the OASDI program. 42 U.S.C. 426(a)(2)(A).

The Greenspan Commission recommended that "all *newly hired* civilian employees of the Federal Government" should be added to OASDI (and made subject to OASDI taxes on their salaries) to strengthen the program.[1] It also recommended that all federal civilian employees be added and made subject to HI taxes on their salaries regardless of date of hire. Commission Report at 171. Congress first acted on the Commission's recommendation concerning the Medicare program, and in 1982 made the salaries of virtually all federal civilian employees subject to HI taxes, effective January 1, 1983. Pet. App. 132a. The following year, Congress acted upon the Commission's recommendation concerning OASDI, providing in the 1983 Amendments that federal civilian employees hired *after* December 31, 1983, would be subject to OASDI taxes.

Under the 1983 Amendments, the vast majority of the federal civilian employees hired before 1984 remained exempt from OASDI taxes. The 1983 Amendments did, however, extend OASDI taxes to a small group of federal officials who had entered office before January 1, 1984. These officials were the President and Vice President, certain senior political appointees, Members of Congress, certain legislative branch employees not already covered by the Civil Service Retirement System (CSRS), and federal judges.[2] In sum, less than one-half of one percent of the existing federal civilian workforce (or less than 12,500 employees) were required to pay OASDI taxes as a result of the 1983 Amendments. J.A. 70.[3]

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[1] Report of the National Commission on Social Security Reform at 2-7 (1983) (Commission Report) (emphasis added).

[2] 42 U.S.C. 410(a)(5)(C)-(G); *see generally* J.A. 43, 53-58. The federal judges in question included all Article III judges, judges of the U.S. Claims Court and U.S. Tax Court, U.S. Magistrates, and U.S. Bankruptcy judges.

[3] The history of the Social Security Amendments, and a careful analysis of the operation and effect of these statutes, is

2. Unlike other federal employees, Article III judges were (and remain) subject to special statutory retirement provisions. After meeting certain age and service requirements, an Article III judge may retire from active service (*i.e.*, assume senior status), but render service as he or she is able. In this event, the judge retains the salary of the office, including increases. 28 U.S.C. 371(b). Alternatively, an Article III judge may retire from office and receive an annuity for the remainder of his or her lifetime equal to the judicial salary at the time of retirement. 28 U.S.C. 371(a). In addition, Article III judges have the option of contributing to the Judicial Survivors' Annuity System (JSAS) to provide for their survivors. 28 U.S.C. 376.

Each Respondent was appointed to the bench prior to the enactment of the Social Security Amendments. Thus, at the time each Respondent decided whether to accept a federal judicial appointment, each understood he would receive the statutory judicial income, and that there would be no deductions for Social Security from this salary. J.A. 87-103. In addition, several took special note of, and relied specifically on, the savings that would result from the provision of statutory retirement benefits without Social Security deductions. *See, e.g.*, J.A. 95, 98, 101-02.

3. Congress recognized that the effect of the 1983 Amendments would be to subject federal civilian employees hired after January 1, 1984, to mandatory withholding for two different retirement programs (*e.g.*, Social Security and CSRS). In order to give these employees economic relief from dual withholding until a new federal retirement system could be created, Congress enacted the Adjustment Act shortly before the 1983 Amendments were to go into effect. Under the "interim plan" of the Adjustment Act, CSRS deductions were

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contained in the declaration of Respondents' expert Peter R. Lynn, which was submitted in support of their motion for summary judgment on liability. J.A. 59-86.

reduced from 7% to 1.3% of an employee's salary to offset the new 5.7% OASDI deduction. Thus, the total amount deducted from a new employee's salary was no greater than the amount withheld from an existing CSRS employee earning the same salary, even though the new employee was subject to both CSRS and OASDI.

The Adjustment Act also included special provisions for the group of incumbent officials mandatorily added to Social Security on January 1, 1984. Congress recognized that "the rules [were] being changed in the middle of the game" for this group and provided them with choices to harmonize their deductions for retirement programs. Conf. Rep. on Adjustment Act, H.R. Rep. No. 98-542, at 13 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1625, 1628. The Conference Report on the Adjustment Act states:

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, *the affected group has no election other than to resign* (which in many instances would involve resignations from elected offices, *lifetime judicial appointments*, or presidentially appointed and Senate-confirmed positions).

Id. (emphases added).

In order to "mitigate th[is] unfairness," *id.*, the Adjustment Act allowed all of the incumbent officials added on January 1, 1984 (other than Article III judges), to choose from three options: (1) to discontinue participation in the covered retirement system (usually CSRS) and receive a refund of previous contributions (resulting in Social Security coverage only); (2) to participate fully in both the covered retirement system and Social Security; or (3) to participate in both systems subject to the Adjustment Act interim "offsets" applicable to new employees, which would leave their total deductions unchanged. Opp. App. 11a-12a.

While the provisions of the Adjustment Act might appear to encompass Article III judges, in actuality they do not. Neither the retirement provisions of the Judicial Code nor the JSAS were defined as "covered retirement systems" within the meaning of the Adjustment Act. Consequently, Article III judges were not entitled to reduce, much less eliminate, the adverse effect of the OASDI tax on their salaries.

Over the next three years, the same incumbent officials covered by the Adjustment Act received two additional opportunities to offset the economic impact of OASDI taxes on their salaries. First, the Deficit Reduction Act of 1984 gave these officials, but not Article III judges, another chance to make the same elections as the Adjustment Act, retroactive to January 1, 1984. Opp. App. 14a-16a. Second, when Congress established a new Federal Employees Retirement System (FERS) in 1986, it gave the same incumbent officials, but not Article III judges, a choice of several retirement options that enabled them to offset the economic impact of OASDI taxes on their salaries.[4] Opp. App 18a-20a.

In January 1985, the Administrative Office of the United States Courts (AOUSC) issued a report regarding the impact of the Social Security Amendments on federal judges and judicial service. J.A. 106-27. The report observed that the rationale for extending Social Security coverage to sitting judges and other incumbent federal officials was "unclear"; it had not been recommended by

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[4] For most new employees, FERS combined Social Security with a basic benefit and an optional savings plan. While pre-1984 employees who participated in CSRS were given the option to join FERS, FERS Act § 301(a), Opp. App. 17a, only four percent chose to do so. J.A. 42. As a result, even with the turnover in federal employees that had occurred since 1984, the majority of civilian federal employees were still not subject to Social Security as of September 1991. *Id.*

the Greenspan Commission nor could it have any measurable impact on system revenues. J.A. 108. More importantly, the report found that Congress' failure to provide sitting Article III judges with an option not to participate in Social Security (1) resulted in "a significant financial disincentive to voluntary judicial service by senior judges"; and (2) was "fundamentally unfair" because the "heavy financial commitments" most sitting judges had made to provide benefits to their survivors "were severely impacted by the imposition of a substantial annual levy," the purpose of which was to provide "an old-age benefit that most judges do not need and survivor benefits for which they had made other arrangements." J.A. 121-22. Over 80 percent of active judges told the AOUSC that they would elect not to be covered if Social Security were made optional for judges. J.A. 127. Congress heeded the AOUSC report, in part, and exempted judicial service by senior judges from OASDI taxes. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, § 12112, 100 Stat. 313.

4. On December 29, 1989, the Respondents initiated this action by filing a complaint in what was then the United States Claims Court. The complaint alleged, *inter alia*, that the Social Security Amendments unconstitutionally diminished their compensation and did so in a manner that unconstitutionally discriminated against federal judges. On November 9, 1990, the Claims Court dismissed the judges' complaint for lack of subject matter jurisdiction (*Hatter I*). Pet. App. 12a-18a. On appeal, the Federal Circuit reversed and remanded the case for a hearing on the merits of the judges' damages action (*Hatter II*). Pet. App. 19a-29a.

5. On remand, the parties conducted discovery and filed cross-motions for summary judgment. On June 22, 1994, the Court of Federal Claims granted the government's motion for summary judgment (*Hatter III*), holding that while "direct" diminutions (*i.e.*, reductions in

statutory salaries) are always unconstitutional, regardless of purpose or effect, an "indirect" diminution (*i.e.*, the imposition of a new tax) is unconstitutional only if a judge can demonstrate that it is the product of "legislative intent to influence the judiciary." Pet. App. 38a. In addition, while the court acknowledged that the elections afforded other incumbent federal officials meant that they, unlike Article III judges, suffered "no change in take home pay," it nonetheless found this discriminatory treatment constitutional because there was no showing that Congress' action was motivated by an intent to influence the judiciary. Pet. App. 48a-51a.

6. On August 30, 1995, the Federal Circuit reversed, holding that the Social Security Amendments unconstitutionally diminish the compensation of Article III judges who took office prior to the enactment of the Amendments (*Hatter IV*). Pet. App. 66a. The court found that, in order to ensure judicial independence and attract good and competent individuals to the bench, "the Framers adopted an unrestricted protection for judicial compensation." Pet. App. 56a-58a. The court held that *Evans v. Gore*, 253 U.S. 245 (1920), controlled the case, and that where federal law did not charge plaintiffs with the duty of paying the tax in question when they first assumed office (as in *Evans*), the subsequent imposition of the tax impermissibly reduced their salaries. Pet. App. 59a. *O'Malley v. Woodrough*, 307 U.S. 277 (1939), did not affect the analysis, since the claimant judge in that case had taken office after Congress had made the taxes in question applicable to judges' salaries; thus, the "judicial claimants had suffered no diminishment in compensation after taking office." Pet. App. 60a. The court remanded the case for calculation of the amounts owed the judges in damages.

7. The government petitioned for a Writ of Certiorari, raising the question whether "some members of this Court are disqualified from hearing" the case, but

arguing, *inter alia*, that "the substantial increase in judicial salaries" that had been granted to all judges since the imposition "would appear to have offset any purported 'diminution' in compensation" caused by the Social Security Amendments. Petition for a Writ of Certiorari at 25 n.12, *United States v. Hatter*, No. 95-1733 (Prior Pet.). On October 7, 1996, finding that it lacked a quorum and that a majority of the qualified Justices "are of the opinion that the case cannot be heard and determined at the next Term of the Court," the Court issued an order stating that the court of appeals' "judgment is affirmed under 28 U.S.C. 2109 . . . with the same effect as upon affirmance by an equally divided Court" (*Hatter V*). Pet. App. 69a.

8. On remand, the Respondents submitted undisputed evidence of the amounts by which their compensation had been diminished by reason of the OASDI and HI taxes. J.A. 128-30. Notwithstanding its prior acknowledgement of the continuing nature of the Respondents' claims, *see* Prior Pet. at 25 n.12, the government argued for the first time on remand before the Claims Court that any judge whose claim was filed more than six years after the *enactment* of TEFRA (with respect to HI withholding) and of the 1983 Amendments (with respect to OASDI withholding) was barred from any recovery by the statute of limitations.

The trial court agreed, and found that only eight judges were entitled to any damages at all and that those judges' claims for diminished compensation were limited to an amount equal to the OASDI withholding for a single month (December 1983). The diminutions in compensation suffered by the eight judges thereafter were "cured" by salary increases that were granted to Article III judges (and other federal employees) beginning January 1, 1984 (*Hatter VI*). Pet. App. at 82a. Thus, the trial court held that eight of the sixteen respondent judges were entitled to no recovery, while the remaining eight were entitled to either $328.95, plus interest (for district court judges) or

$347.85, plus interest (for the court of appeals judge). Pet. App. 110a-11a.

The Federal Circuit reversed the trial court's conclusion that the general salary increases granted to all Article III judges (and other federal employees) "cured" the diminution in compensation suffered by those judges who accepted their appointments prior to the enactment of the 1983 Amendments (*Hatter VII*). Pet. App. 125a. The court found that "everything in the record and legislative history makes clear that these [salary] increases" were provided to offset the effects of inflation. Pet. App. 124a. Because the affected judges would have received the general increases regardless of whether their salaries had been diminished, "using [those increases] to offset the losses they incurred from the government's earlier wrongful act" would "deprive the pre-1983 judges of the benefit of those increases," and defeat "Congress'[ ] purposes in granting the increases." Pet. App. 125a.[5]

SUMMARY OF ARGUMENT

The guarantees of life tenure and undiminished compensation in Article III, Section 1 of the Constitution serve two important purposes: they protect the independence of the Judicial Branch and ensure that able lawyers

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[5] The Federal Circuit panel initially agreed with the trial court that the judges' claims were not "continuing" claims, and therefore that a number of claims were time-barred. Pet. App. 126a. Thereafter, both Respondents and the government petitioned for rehearing and rehearing *en banc*. The court denied the government's petition, but granted the Respondents' petition with respect to the statute of limitations issue. In an opinion by Judge Plager, the author of the panel opinion, the *en banc* court unanimously reversed the panel's decision on the statute of limitations issue (and reinstated the panel's opinion with respect to the other issues). Pet. App. 2a. The government has not sought review of the Federal Circuit's holding on the statute of limitations issue.

are attracted to the bench. Congress' extension of Social Security taxes to sitting Article III judges violated the Compensation Clause because it undermined these purposes by reducing judicial compensation in a manner that created an economic incentive for sitting judges to leave the bench and for judicial candidates to reject such appointments. In subsequent legislation, Congress did not remedy this problem, but rather compounded it by ensuring that the only federal employees that suffered a reduction in take-home pay by virtue of the statutes in question were sitting Article III judges.

1. In 1986, this Court affirmed for lack of a quorum the Federal Circuit's decision holding that the extension of OASDI and HI taxes to Article III judges violated the Compensation Clause. The Court's decision is the law of the case, and the government has not justified the reopening of this decision on the ground that it has "worked a manifest injustice." On the contrary, to reconsider this decision some four years later would itself work such an injustice. Many of the affected judges have stopped OASDI and HI withholding and many may have made significant financial commitments in reasonable reliance on the Court's order. It would be unjust for the Court to upset the settled expectations of the Respondents and similarly situated judges.

2.a. The government's proposed reading of the Compensation Clause as prohibiting only reductions in the "stated salary in law," Pet. Br. at 28, is inconsistent with the history, purposes and plain language of the Clause. As discussed extensively in *Evans*, the Framers did not intend a narrow construction of the Clause, but one broad enough to encompass any actions by the political branches that exert " 'power over a man's subsistence.' " *Evans*, 253 U.S. at 252 (quoting The Federalist No. 79 (Alexander Hamilton)). Because of concerns that

diminutions in judicial compensation could be accomplished directly, indirectly, or "even evasive[ly]," the Framers adopted a "more positive and unequivocal" protection against diminution. *Id.* at 254-55. The *Evans* Court, therefore, correctly concluded that limiting the scope of the Compensation Clause only to reductions in statutory salary would gravely undermine its purposes. Indeed, if the interpretation of the Clause now advanced by the government were accepted, Congress could, with impunity, impose a tax on the compensation of one or more judges for the purpose of punishing them. This is precisely what the Framers sought to prevent through the Compensation Clause.

b. This Court need not revisit *Evans v. Gore*, or reaffirm its broad holding, in order to affirm the judgment below because this case does not involve the imposition of a general, non-discriminatory tax on all citizens. (1) This case instead involves the extension to Article III judges of taxes from which they had been exempt for decades. The extension of these taxes to sitting judges has precisely the same effect, and undermines the purposes of the Compensation Clause in precisely the same manner, as a diminution in their stated salaries: it alters only one side of the economic trade-off that a judge makes when he or she assumes the bench. If the political branches can act in this manner, they have the power to place sitting judges in a position where they must petition the Congress to restore their compensation or consider leaving the bench, a result that would render the Compensation Clause meaningless. (2) This case also involves a discriminatory reduction in the amount of judges' compensation. Congress expressly acknowledged that the 1983 Amendments had a discriminatory impact on the compensation of the small group of incumbent officials, including Article III judges, that were required

to join OASDI. Congress, however, proceeded to compound this problem by offering all incumbent officials *except Article III judges* three separate opportunities to avoid any decrease in take home pay. This discriminatory treatment of the Judiciary is also at the core of what the Framers sought to prevent through the Compensation Clause.

c. Contrary to the government's suggestion, affirmance of the judgment below would not require tax rates to be "frozen" at the time a judge accepts his or her appointment. So long as taxes are changed uniformly for judges and non-judges alike, the compensation of judges would not be adversely affected in a manner that could induce judges to leave office (or not accept judicial appointments). Further, it is the government's reading of the Compensation Clause that would lead to an interpretation of the Presidential Compensation Clause and the Twenty-Seventh Amendment that would permit Congress to circumvent their strictures by changing the taxes paid by the President or Members of Congress alone, which would clearly contravene the letter and purpose of those provisions.

3. The government does not dispute that the purpose of the general adjustments to judicial salaries that have occurred since 1983 was to compensate judges for the effects of inflation, not "to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional" diminishment of their compensation. Pet. App. 124a. These adjustments were not, therefore, provided by Congress to compensate for the Compensation Clause violations in this case. Moreover, inflation adjustments granted to all judges would not provide a remedy to the injured judges since they alone would be required to offset their constitutional damages against these general increases, thereby undermining the purposes of the Compensation Clause.

ARGUMENT

I. THIS COURT SHOULD AFFIRM ON LIABILITY UNDER THE LAW OF THE CASE DOCTRINE

This Court has already entered an order on liability: It *affirmed* the Federal Circuit's decision holding that the extension of HI and OASDI taxes to Respondents violated the Compensation Clause. Pet. App. 69a. That decision is the law of the case and should be adhered to. To be sure, the Court's decision was rendered for lack of a quorum. But that decision has the same effect as affirmance by an equally divided court, *see* 28 U.S.C. 2109, and there is no question that an affirmance by an equally divided court is fully binding on the parties to this case and constitutes a judgment on which they are entitled to rely. *See Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) (affirmance by an evenly divided court "is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case"); *see also United States v. Pink*, 315 U.S. 203, 216 (1942). While this Court has the power to reopen issues decided in earlier stages of the same litigation, it has limited the exercise of this power to circumstances in which its earlier decision is " 'clearly erroneous and would work a manifest injustice.' " *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). The government has not even attempted to show that adherence to the prior affirmance "would work a manifest injustice" in this case.[6]

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[6] The government has argued that the Court should reopen the liability issue because it did not "examine the merits of that issue" when the question was previously presented. Pet. at 20. But in 28 U.S.C. 2109, Congress instructed the Court to issue an order affirming the judgment below once it determines that a quorum is not available to hear the case in the current Term or the next Term. The statute thus provides the parties with an opportunity to have their case heard in one of two consecutive

To the contrary, to reopen the issue of liability now would itself "work a manifest injustice." In the years following this Court's affirmance, upon the request of individual judges, the AOUSC stopped OASDI and HI withholding (or in a few cases just OASDI witholding) from the salaries of 89 of the so-called Hatter judges. *See* Letter from William R. Burchill, Jr. to Seth Waxman, *et al.* (Dec. 19, 2000) (lodged with the Court by the Solicitor General on Jan. 3, 2001).[7] The ruling the government seeks would plainly upset the settled expectations of the Respondents, as well as other similarly situated judges, who reasonably relied on the Court's decision. These judges have already ceased witholding of over $800,000 in Social Security taxes. *Id.* Moreover, prospectively the affected judges have undoubtedly made major life commitments – such as college tuitions, home purchases, and the like – on the basis that their future disposable income

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Terms, but also provides them with a decision in the event that it cannot be heard in that time frame. To accept the government's argument, then, is to deprive parties of the finality and repose afforded by the statute. It also serves to encourage the losing party to engage in additional "wasteful and pertinacious" litigation, Pet. at 20, in the hope that it may return to this Court and argue that it is entitled to reopen issues that have been decided.

[7] Petitioner contends that "[t]he Department of Justice . . . did not advise AOUSC that it could [allow judges to discontinue the tax deductions into the future]." Reply Br. on Cert. Pet. at 4 n.2. The AOUSC, however, made inquiries to relevant government agencies seeking guidance on this very issue, including to the Department of Justice, which "advised that it was not their decision but rather one for the Internal Revenue Service." Enclosure to Letter from William R. Burchill, Jr., *supra*, entitled, Questions and Answers Regarding *Hatter v. United States* (January 1997) at 1. Having apparently failed to receive any guidance whatsoever, the AOUSC can hardly be criticized for implementing this Court's 1996 affirmance by permitting judges to discontinue OASDI and HI withholding.

will include amounts previously withheld for Social Security. *See, e.g.*, J.A. 95, 101-02. It would be manifestly unjust to depart from the settled law of the case, undermining what now may be irrevocable life commitments judges have made in reasonable reliance on the Court's 1996 affirmance on liability.

II. THE EXTENSION OF SOCIAL SECURITY TAXES TO SITTING ARTICLE III JUDGES VIOLATES THE COMPENSATION CLAUSE

A. The Guarantee of Undiminished Compensation Is Not Limited to Reductions in Statutory Salary

Article III, Section 1 of the Constitution guarantees that the compensation of judges "shall not be diminished during their continuation in office." U.S. Const. art. III, § 1. In *Evans v. Gore*, 253 U.S. 245, 255 (1920), this Court concluded that "the fathers of the Constitution intended to prohibit diminution by taxation" as well as reductions in the judges' statutory salaries. The government now urges the Court to overrule *Evans*, and hold that the only diminution in compensation that falls within the proscription of Article III, Section 1 is a reduction in the "salary stated in law." Pet. Br. at 28. This interpretation of the Compensation Clause is unsupportable; it is inconsistent with the history, purposes and plain language of the Clause, and if adopted would undermine the independence and competence of the Judicial Branch.

1. In *United States v. Will*, 449 U.S. 200 (1980), this Court reviewed the history of the Compensation Clause and observed that the Framers designed the Clause to achieve two related goals. One purpose of the Compensation Clause was to ensure the independence of the Judicial Branch. Despite "the longstanding Anglo-American tradition of an independent Judiciary," in 1761 King George III "converted the tenure of colonial judges to

service at his pleasure." 449 U.S. at 217-19. The dependence of colonial judiciaries on the King and Parliament was a principal factor in the outbreak of hostilities between the colonies and England.[8] Indeed, the Declaration of Independence enumerated as one of its specific grievances that the King " 'has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.' " *Id.* at 219 (quoting the Declaration of Independence). The *Will* Court concluded that, because of this history, the Framers "made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that brought on the Revolution and separation." *Id.* By proscribing the Executive and Legislative Branches' "control over the tenure and compensation of judges," the Compensation Clause guarantees that the Judicial Branch is "truly independent." *Id.* at 218.

The Compensation Clause also serves "another, related purpose": it serves to increase the stature and competence of the federal judiciary. *Id.* at 221. *See also* Charles Gardner Geyh & Emily Field van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 Chi.-Kent L. Rev. 31, 42 (1998) (the Framers wanted to "ensure that judges receive[d] salaries commensurate with their status as members of an independent branch of

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[8] *See generally* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 Penn. L. Rev. 1104 (1976). The Intolerable Acts, including the Act that made colonial judges serve at the pleasure of the King, led to more organized resistance to English rule. *See id.* at 1151-52. The First Continental Congress, in its "Declaration of Colonial Rights and Grievances," dated October 1, 1774, protested that judges had been made dependent on the King for their salaries. *See id.* at 1152. A reconciliation proposal composed by Benjamin Franklin in December 1774 insisted that judges have tenure during good behavior and be paid from colonial revenues. *Id.*

government"). As Chancellor Kent observed, the guarantee of undiminished compensation "secure[s] a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuit of private business, for the duties of that important station." 1 J. Kent, Commentaries on American Law 276 (1826). The *Will* Court, citing *Evans*, found that by assuring "a prospective judge that, in abandoning private practice – more often than not more lucrative than the bench – the compensation of the new post will not diminish," the Compensation Clause "[b]eyond doubt . . . has served to attract able lawyers to the bench and thereby enhance[d] the quality of justice." 449 U.S. at 221.

2. The government asserts that the only diminution in compensation that falls within the proscription of the Compensation Clause is a "reduction in judges' salary stated in law, not a decrease in their effective take-home pay net of taxes." Pet. Br. at 28. This narrow interpretation was rejected in *Evans*, and should be rejected by this Court, as it is patently inconsistent with the history, purposes and plain language of the Clause. If this Court were to limit the scope of the Compensation Clause in the manner now urged by the government, it would provide the political branches with a ready means to accomplish precisely what the Framers sought to proscribe – *i.e.*, it would allow them to punish sitting Article III judges by simply imposing taxes on the compensation of those judges alone.[9]

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[9] The government unequivocally urges this Court to hold that only a reduction "in judges' stated salaries, not a decrease in their effective take-home pay net of taxes" is proscribed by the Compensation Clause. Pet. Br. at 28. Yet at other times the government seems to suggest that a "discriminatory" tax on judicial compensation would be unconstitutional. *See, e.g.*, Pet. Br. at 14-15. The inconsistency in the government's position is highlighted, but not resolved, at p. 37 n.27 of its brief, where it states that although it has argued that "the Constitution's reference to 'Compensation' is *only* to judges' stated salaries," it "*assume[s]* that discriminatory taxation of judges would contravene fundamental principles underlying Article III, if not the Clause itself." (emphases added). The government's reluctance to concede that a discriminatory tax on judicial compensation would violate the Compensation Clause is understandable because, as we demonstrate below, this case involves a discriminatory tax on judicial compensation.

a. *Evans' Holding and Rationale.* The central question presented in *Evans* was: does the Compensation Clause "merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective diminution such as withholding or calling back a part as a tax on the whole?" 253 U.S. at 248-49. The Court first examined the purposes of the Clause, and found that its dual purposes were "to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance" of the "pervading principles of the Constitution." *Id.* at 253. Next, the Court examined the plain language of the Clause, which it found "contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." *Id.* at 255. Finally, the Court examined the historical context in which the Clause was written, and found that the Framers well understood that "the power to tax carries with it 'the power to embarrass and destroy.'" *Id.* at 256 (citation omitted). Based on these findings, the *Evans* Court concluded that "the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise." *Id.* at 255.

b. *History and Text.* The *Evans* Court correctly concluded that limiting the scope of the Compensation

Clause to reductions in the statutory salary would be inconsistent with the historical underpinnings and plain language of the Clause. As the Court observed in *Will*, King George III had made colonial judges dependent on him not only for their tenure in office, but also for " 'the amount *and payment* of their salaries.' " *Will*, 449 U.S. at 219 (emphasis added) (quoting Declaration of Independence). The Framers therefore sought to ensure that the political branches could not threaten the judiciary either directly, through removal from office, or indirectly, through reductions in compensation. Alexander Hamilton explained in Federalist No. 79: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" *Evans*, 253 U.S. at 252 (emphasis in original) (quoting The Federalist No. 79).

This history fully supports the *Evans* Court's conclusion that the term "compensation" cannot be narrowly construed to mean, as the government now urges, the judges' "salary stated in law." The Framers' concern was with the ability of the political branches to exert "power over a man's subsistence" – *i.e.*, the amount he ultimately receives from the government to support himself and his family – not simply the nominal salary provided by statute. As *Evans* observes, Alexander Hamilton made this point clear in discussing the unsuccessful efforts of state constitutions to guarantee judicial independence and competence through the use of "*permanent* salaries." 253 U.S. at 252 (citing The Federalist No. 79) (emphasis in original). Hamilton reported that the states' "experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions." *Id.* at 253. Consequently, in the Constitution, the Framers designed a protection against undiminished compensation that is "more positive and unequivocal," and thereby

affords Article III judges "a better prospect of their independence than is discoverable in the constitutions of any of the States." *Id.*[10]

History, in short, made it obvious to the *Evans* Court, as it did to the Framers, that "diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested." *Id.* at 254. To protect the judiciary against both direct and indirect assaults on its independence and competence, the Framers adopted what Alexander Hamilton termed the "more positive and unequivocal" protection of a broad prohibition on diminution in judicial compensation. This broad prohibition was implemented, as the *Evans* Court correctly observed, through language that "is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." 253 U.S. at 255.

While the court of appeals found that this case was governed by *Evans*, it did not follow the *Evans* decision blindly. On the contrary, the court of appeals undertook its own review of the records of the Constitutional Convention and found that the "text and history of the Compensation Clause do not support" the contention that the Clause applies only to diminutions in the statutory salary. Pet. App. 63a. The Court observed that the Convention "voiced grave concerns about potential compromises in judicial independence if judges faced the prospect of seeking legislative redress of compensation concerns." Pet. App. 62a. Based on this history, the court found that the Framers "considered judicial independence a core value of the Constitution and adopted a broad protection

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[10] *See also* Geyh & van Tassel, 74 Chi.-Kent L. Rev. at 47 ("Unhappy experiences with judicial dependence on the crown prior to the Revolution had given way to equally unhappy experiences with judicial dependence on the legislatures afterwards . . . . ").

for it." Pet. App. 63a. Specifically, as Alexander Hamilton explained, the Framers "put it out of the power of [the legislature] to change the condition of the individual [judge] for the worse." Pet. App. 63a.[11] Because the imposition of a new tax on a sitting Article III judge "change[s] the condition of the individual [judge] for the worse," the court of appeals concluded, as did this Court in *Evans*, that the imposition of such a tax is unconstitutional. Pet. App. 64a.

c. *Purposes*. The *Evans* Court correctly concluded that limiting the scope of the Compensation Clause to reductions in the statutory salary would gravely undermine its purposes. A reduction in the statutory salary of ten percent is no different, in terms of its impact on a judge's compensation, than a tax of ten percent on that salary. Each gives the legislature the same degree of "power over a man's subsistence." As the Court observed with respect to Judge Evans: "Of what avail to him was the part which was paid with one hand and then taken back with the other? . . . Only by subordinating

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[11] Hamilton was by no means alone in believing that a broad proscription against legislative interference with judicial compensation was necessary; at the Constitutional Convention, this concern crossed ideological and geographical divides. *See, e.g.*, Geyh & van Tassel, 74 Chi.-Kent L. Rev. at 47. As James Wilson, a Pennsylvania delegate to the Constitutional Convention, saw it, judges "should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behaviour and its consequences." James Wilson, *Lectures on Law* (1791), *reprinted in* 4 The Founders' Constitution 162 (1981). Likewise, James Madison was so concerned about Congress' control over judicial compensation that he argued in favor of proscribing any diminution *or increase* in that compensation. *See Debates in the Federal Convention* (July 18, 1787); Pet. App. 62a.

substance to mere form could it be held that his compensation was not diminished." 253 U.S. at 254. The government made this point in its brief in *Will*, where it acknowledged that this Court "has recognized that 'indirect' as well as 'direct' diminishments fall within the proscription of the Compensation Clause." Brief for the United States at 68 (No. 79-983) (citing *Evans*, 252 U.S. at 248-49, 254).[12] The court of appeals reached the same conclusion on the facts of this case. Pet. App. 63a.

If the interpretation of the Clause now advanced by the government were accepted, Congress could impose a tax on the compensation of Article III judges alone, or a group of those judges, for the express purpose of punishing them. This is the very evil that the Framers sought to prevent. Yet, according to the government, such a tax would not be unconstitutional because "the diminution of judicial compensation prohibited by Article III is a reduction in the judges' salary stated in law, not a decrease in their effective take home pay net of taxes." Pet. Br. at 28. The *Evans* Court correctly rejected the government's contention, finding that "the purpose of the prohibition [could] be wholly thwarted if this avenue of attack were left open." 253 U.S. at 256.[13]

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[12] An excerpt, including the portions cited in this brief, from the United States' Brief in *Will* is contained in the Joint Appendix filed with the Federal Circuit in *Hatter IV*.

[13] The government argues that "[t]he weight of state court cases" supports its position. Pet. Br. at 23. As this Court held in *Evans* (and as the government implicitly acknowledges in its brief, *see* Pet. Br. at 25 & n.13), however, numerous state court decisions have interpreted comparable state constitutional provisions to extend beyond direct diminutions in statutory salary. *See Evans*, 253 U.S. at 256 (citing *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & Serg. 403, 415 (Pa. 1843) (tax on state officials); *New Orleans v. Lea*, 14 La. Ann. 197 (La. 1859); *Purnell v. Page*, 145 S.E. 534 (N.C. 1903) (income tax)). *See also Long v.*

3. Neither this Court, nor any lower court, has ever embraced the government's crabbed reading of the Compensation Clause. In what appears to be the first case brought under the Clause, the Circuit Court of the District of Columbia held that a federal statute that eliminated fees charged by justices of the peace violated the Compensation Clause insofar as it applied to justices of the peace who held office when the statute was enacted. *See United States v. More*, 7 U.S. (3 Cranch) 159, 159 n.2 (1805) (setting forth lower court opinions). The *Evans* Court likewise concluded that the imposition of a tax on the compensation of sitting Article III judges violates the

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Watts, 110 S.E. 765 (N.C. 1922) (income tax); *Gordy v. Dennis*, 5 A.2d 69 (Md. 1939) (income tax); *In re Opinions of Justices*, 144 So. 111 (Ala. 1932) (occupational tax on state and county officers). Indeed, several state courts have explicitly stated that their compensation clauses prohibit precisely that which the Social Security Amendments attempt to do, *viz.*, increase the amounts that judges must contribute to retirement programs. *See, e.g., Carper v. Stiftel*, 384 A.2d 2, 6 (Del. 1977) ("Precisely the same pension benefits cost each plaintiff over $1,000 per year more after the 1976 Amendment than they did before. It is somewhat difficult to see how it can be seriously contended that each plaintiff's 'salary or emoluments' has not been diminished."); *Hudson v. Johnstone*, 660 P.2d 1180, 1182 (Alaska 1983) ("Were the legislature to implement a contributory judicial retirement system by exacting salary deductions from justices and judges 'during their terms of office,' it would clearly run afoul of the compensation clause [of the Alaska Constitution]."") (footnote omitted). Moreover, the fact that Pennsylvania has altogether "delete[d] the prohibition against diminution of judicial salaries," Pet. Br. at 25 n.13 (citing *Hepburn, supra*), and that "Maryland amended its constitution expressly to permit . . . a nondiscriminatory tax on judicial salaries," *id.* (citing *Gordy, supra*), does not undermine interpretations of the earlier provisions which, after all, were far more analogous to the federal Compensation Clause than were the amended provisions.

Clause. In *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939), the Court held that the assessment of a "non-discriminatory tax" on "judges who took office after Congress" imposed the tax did not violate the Clause. It did not hold that the Clause reaches only reductions in the statutory salary; nor did *Will*. 449 U.S. at 221. Consistent with these holdings, the court in *Atkins v. United States*, 556 F.2d 1028, 1045, 1048 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) found that "indirect incursions upon judicial salaries, as much as direct ones, were not tolerable under the Compensation Clause," and specifically noted that the imposition of a discriminatory tax on judges would violate the Clause.[14]

4. This Court's conclusion in *Evans v. Gore* that the Compensation Clause prohibits diminutions by the political branches in judicial compensation accomplished through means other than reductions in the statutory salary is plainly correct. It is consistent with the history, purposes and text of the Clause. To hold otherwise, as the government urges, would give the political branches ready means to accomplish the very evil the Framers sought to prevent, and gravely undermine the purposes of the Clause.

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[14] *Jefferson County v. Acker*, 210 F.3d 1317 (11th Cir. 2000), *petition for cert. filed*, No. 00-455 (U.S. Sept. 22, 2000), is not to the contrary. First, like *O'Malley*, it involves the application of a tax "to Article III judges who were on notice when they were appointed that the tax would be applied to them," 210 F.3d at 1319, 1321-22. Second, *Acker* involves the application of a county occupation tax, not a diminution in judicial compensation imposed by the political branches of the federal government.

B. The Extension of Social Security Taxes to Sitting Article III Judges Diminishes Judicial Compensation and Thus Falls Squarely Within the Prohibition of the Compensation Clause

Although *Evans v. Gore* was correctly decided, the Court does not need to revisit that decision, or reaffirm its broad holding, in order to affirm the judgment of the court below. To be sure, the court of appeals' decision rested principally upon "the controlling Supreme Court precedent, *Evans*." Pet. App. 64a. This case is unlike *Evans*, however, in two fundamental respects. Rather than involving the imposition of a general, non-discriminatory tax on all citizens, this case involves: (1) the extension to sitting Article III judges of a tax from which they previously had been exempt for decades; and (2) the discriminatory application of a tax to the compensation of those judges.[15] Each of these distinctions provides a separate and independent basis for affirming the decision below. This Court should reject the government's invitation to reconsider and overrule *Evans* where, as here, there are two separate and independent grounds for affirmance that do not require the Court to revisit established precedent.[16] *See, e.g., United States v. IBM*, 517 U.S. 843, 862 (1996).

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[15] As of January 1, 1983, Article III judges had been exempt from the OASDI tax for almost 50 years and from the HI tax for almost 20 years.

[16] Both of these grounds were raised in, and ruled upon by, the trial court (Pet. App. 43a-46a; 48a-51a), and raised in the court of appeals as well, *see* Brief for Appellants at 31-33, 38-50, *Hatter IV*.

1. The Extension of Social Security Taxes to Sitting Judges' Compensation Violates the Compensation Clause in the Same Manner as Would a Reduction in Their Statutory Salaries

In order to protect judicial independence and competence, the Framers prohibited the political branches from taking any action that could, directly or indirectly, induce judges to leave the bench. The critical constitutional inquiry under the Compensation Clause, therefore, cannot be simply how a particular diminution in compensation is accomplished, but whether the manner in which it is accomplished could induce judges to leave the bench. The extension of Social Security taxes to sitting Article III judges, like a diminution in their statutory salaries, unquestionably has this effect.

1. It has long been recognized that men and women who accept judicial appointments under Article III almost certainly make an economic trade-off: they leave positions that "more often than not [are] more lucrative than the bench," presumably because the non-monetary rewards of holding judicial office offset any pecuniary loss. *Will*, 449 U.S. at 221 (quoting *Evans*, 253 U.S. at 253; 1 J. Kent, Commentaries on American Law 276 (1826)). If the political branches are able to alter the terms of this trade-off *after* a judge has accepted appointment to the bench – *i.e.*, if they are able to change one side of the judges' economic equation – they will have the power to influence the judiciary in precisely the way the Framers feared. Actions that have this effect will place sitting judges in a position where they must petition the Congress to restore their compensation, or consider leaving the bench because the fundamental economic calculus on which they accepted their appointments has been changed.

Diminutions in the statutory judicial salary always have the effect of changing just one side of the judges'

economic calculus. Such diminutions, after all, decrease judicial compensation but have absolutely no impact on the compensation a judge would earn in another occupation. By altering only one side of the economic equation that the judges considered in deciding whether to accept appointment to the bench, a diminution in judicial salary could induce judges to leave the bench, and thus undermine the purposes of the Compensation Clause.

The extension of Social Security taxes to sitting Article III judges has precisely the same effect, and undermines the purposes of the Compensation Clause in precisely the same manner, as a diminution in their stated salaries. It decreases their judicial salaries but has absolutely no impact on the compensation the judges could earn in another occupation (which were already subject to such taxation), thus creating an incentive for judges to leave the bench.

Uncontroverted record testimony establishes this point. Each Respondent has testified that when he decided to accept his appointment to the federal bench, he compared his existing compensation, which already reflected Social Security deductions, to his prospective compensation as a judge, which included no diminution for Social Security taxes (and the prospect of future salary increases).[17] Judge McNamara, for example, testified that he "was concerned about paying for [his four children's] higher education." He knew he was "taking a substantial pay cut in becoming a judge and it was important to [his] weighing of the financial consequences that there would be no deduction from [his] salary for Social Security." J.A. 95. Judge Mihm testified that "[t]he financial consequences of accepting a judicial appointment were especially important to me and my family because I had spent

[17] The Respondents' declarations were filed in support of their cross-motions for summary judgment and appear in the Joint Appendix filed with the Federal Circuit in *Hatter IV*.

my career as a lawyer in public service, rather than in private practice." *Id.* at 101. Also concerned about paying for a college education for his four children, Judge Mihm said that "[b]efore accepting the appointment, my wife and I sat down at our kitchen table and discussed these financial circumstances, including the fact that I would not have amounts deducted from my pay for Social Security." *Id.* Indeed, Congress itself acknowledged that the Social Security Amendments, by "chang[ing] [the rules] in the middle of the game," gave sitting Article III judges "no election other than to resign." H.R. Conf. Rep. No. 98-542, at 13.

2. The fact that judges had been exempt from Social Security for almost fifty years (and HI taxes for almost twenty years) distinguishes this case from *Evans v. Gore*. While the effect of the income tax in *Evans* was to diminish the compensation of sitting Article III judges, it also diminished the compensation those judges could earn in another occupation. Here, in contrast, because Respondents became judges at a time when judicial salaries were exempt from Social Security taxes, the extension of those taxes altered only one side of the economic equation they weighed in deciding whether to accept their appointments.

The government contends that this analysis overlooks the benefits that sitting judges obtained "by becoming eligible for OASDI and HI coverage based on their judicial service." Pet. Br. at 35. This contention is wrong as a matter of fact, and irrelevant as a matter of law. The 1985 AOUSC report found that 95 percent of judges in active service had already attained fully insured status in the Social Security system (which would have included Medicare as well). J.A. 115. Moreover, as a matter of law, the judges' payment of Social Security taxes does not assure them of any benefits. As this Court concluded in *Bowen v. POSSE*, 477 U.S. 41, 52 (1986), the Social Security

Act "create[s] no contractual rights." The Act incorporates "Congress' express reservation of authority to alter its provisions," including the potential reduction or elimination of benefits in their entirety. *Id*. For this reason, the court of appeals rejected the government's contention that Social Security benefits must be taken into account in measuring the diminution in Respondents' salaries, finding that the "potential future benefit is entirely speculative." Pet. App. 65a. The government has not sought review of this holding.

The government's related contention, that the affected judges "have never suggested that they would waive the right to receive benefits based on their judicial service in return for exemption from OASDI and HI taxes," Pet. Br. at 35, is equally erroneous. The fact is that the judges were never offered the opportunity to make this election. The Respondents' complaint makes clear that their claim is that the statutes at issue violated the Compensation Clause because, *inter alia*, "Article III judges were not given the right granted to other federal employees to opt out of the Social Security system."[18] J.A. 26, 34-35.

3. The government argues that there is no evidence that the statutes at issue actually "caused federal judges to leave judicial service." Pet. Br. at 35. No court has ever suggested, however, that a diminution in judicial compensation is unconstitutional only if it can be shown to have caused judges to leave office. In *Will*, for example, the diminutions at issue were no greater in dollar terms than they are here, and there was no evidence that those

[18] The 1985 AOUSC report found that if the judges had been given this option, over 80 percent of active judges would have opted out of Social Security coverage. J.A. 127. And, since the AOUSC gave judges the option to cease Social Security withholding after *Hatter V*, 89 of the affected judges have done so. *See* p. 15, *supra*.

diminutions caused judges to leave office. Yet the Court found them to be plainly unconstitutional. *Will*, 449 U.S. at 225-26.

The reason the courts have not required such a showing is clear: it would completely defeat the Framers' intent in designing the Clause. The Framers were concerned that if the political branches had the power to use reductions in compensation to induce judges to leave office, judges would be subject to the influence of those branches, regardless of whether they ever exercised that power. Moreover, once the political branches have succeeded in forcing a judge from office by diminishing his or her compensation, they have achieved the very evil that the Framers sought to avoid. If this Court were to hold, as the government suggests, that a diminution in judicial compensation is unconstitutional only if there is a showing that the diminution "caused judges to leave judicial service," it would render the Compensation Clause meaningless.

4. The government also contends that the diminution in compensation that resulted from the extension of Social Security taxes to Article III judges is constitutional because it could not "have posed any threat to judicial independence." Pet. Br. at 34.[19] The government bases

[19] The government apparently has abandoned its contention that a diminution in compensation that results from the imposition of a tax on sitting Article III judges cannot be unconstitutional absent a showing that "Congress intended to undermine the independence of federal judges." Pet. at 26 n.25. In *Will*, this Court struck down Congress' rescission of certain cost-of-living increases for judges even though there was no argument that the rescissions in question were "intended to undermine the independence of federal judges." *Id*. *See also* 15 James Wm. Moore, Moore's Federal Practice ¶ 100.05[4][a-b] (Matthew Bender 3d ed. 1999) (rejecting the contention that the Compensation Clause reaches only those diminutions that "actually threaten judicial independence," explaining that "the

this contention on the broad assertion that "[i]t is likely that political constraints on the imposition of taxes on the population at large effectively prevent Congress from using generally applicable, nondiscriminatory taxes to impair the independence of the judiciary." *Id.* at 34 n.24. However "likely" this may be in a case such as *Evans v. Gore*, it is not likely at all in a case such as this, where sitting Article III judges (1) were among a very small group of existing federal employees to whom the taxes were extended, and (2) were the *only* employees that were given no opportunity to avoid the adverse impact of this diminution on their compensation.

The government, moreover, advanced the same argument in *Will*. It asserted that the statutes in that case could not have "constitute[d] an attack on judicial independence" because they "were based on important policy considerations extending far beyond the federal judiciary," and "were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and Executive Schedule personnel, and members of Congress." Brief for the United States at 64-65. The Court flatly rejected this argument: the fact that Congress diminished the compensation "of various officials in the Legislative and Executive Branches, as well as judges, does not save the statute." *Will*, 449 U.S. at 226.

Indeed, the government's brief in this case acknowledges that the "political constraints" which it believes will protect judicial independence from attack through the imposition of a generally applicable, nondiscriminatory tax would not offer the same protection when the diminution in compensation "affects only a small number

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difficulty and awkwardness of engaging in this equitable inquiry lies behind the practice of separation of powers in general. In any event, the text of Article III does not permit such a course.").

of individuals and not the general public." Pet. Br. at 34 n.24. This would be true, the government notes, if Congress diminished the statutory salaries of judges (as it did in *Will*). *Id.* But it is also true in this case, where the diminution was imposed on a small group of existing federal officials (as in *Will*) who accepted their positions before the enactment of the statutes at issue. Congress' extension of Social Security taxes to sitting Article III judges put those judges in precisely the position the Framers feared – a position where their only choices were to lobby Congress to avoid the diminution, accept the diminution, or resign from office.[20]

2. The OASDI Deductions Violate The Compensation Clause Because They Discriminate Against Article III Judges

The Federal Circuit's judgment on liability with respect to OASDI is independently sustainable on the ground that the 1983 Amendments diminished judicial compensation in a discriminatory manner. Although a showing of discrimination is not necessary to prove a violation of the Compensation Clause, *see Will*, 449 U.S. at

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[20] This case also makes clear that even when Congress diminishes the compensation of a group of federal officials, including its own members, the judges cannot rely on those officials to protect the interests of the Judicial Branch. When Congress recognized that by "changing the rules in the middle of the game," it had placed high ranking federal officials, including sitting Article III judges, in a position where they either had to accept diminished compensation or resign, it passed a series of statutes that gave all of those officials, *with the sole exception of federal judges*, the ability to eliminate the economic impact of the OASDI withholding. *See* pp. 4-6, *supra*. This is precisely the type of legislative conduct that the Framers sought to prevent.

226 (the Clause "makes no exceptions for 'non-discriminatory' reductions"), there is no genuine dispute that the Clause prohibits the enactment of a statute that imposes a different and greater economic burden on the compensation of Article III judges. *See O'Malley*, 307 U.S. at 282; Pet. Br. at 37 n.27. Such a statute is no different, in effect, than a diminution in the judges' statutory salary; both create an incentive for judges to leave office (or decline appointments) by reducing judicial compensation alone. In this case, only Article III judges' compensation was involuntarily diminished as a result of the imposition of OASDI deductions; the take home pay of every other federal employee was protected.

1. The 1983 Amendments discriminated against Article III judges in at least two ways. First, the statute did not impose OASDI taxes on all incumbent federal employees. On the contrary, the statute added only *newly* hired federal employees and a limited number of incumbent officials, including federal judges, to the OASDI system. All other federal employees on the job before 1984, in excess of 2.5 million people, J.A. 41, were not added to OASDI unless they later elected to join. Opp. App. 17a. Ninety-six percent of these employees, however, elected *not* to join the OASDI system. J.A. 42. As to federal employees, OASDI was not, therefore, a generally applicable tax.[21]

Second, judges were treated less favorably than the small group of other incumbent officials, comprising primarily Members of Congress and their staffs, the President and Vice President, and political appointees in the executive branch, that were required to join OASDI by

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[21] Nine months after judges were added to OASDI, more than 1.7 million federal employees remained outside the system. J.A. 42. As of the parties' 1991 stipulations, in excess of 1.5 million federal employees – more than half the civilian federal work force – were not covered by OASDI. J.A. 42.

the 1983 Amendments. Congress found that "the rules [were] being changed in the middle of the game" for this group, subjecting them to two separate retirement schemes. Conf. Rep. on Adjustment Act, H.R. Conf. Rep. No. 98-542, at 13. To remedy this unfairness, Congress enacted the Adjustment Act, the Deficit Reduction Act of 1984, and the FERS Act, each of which offered the incumbent Executive and Legislative Branch officials a separate opportunity to avoid any decrease in take-home pay. Although Congress expressly recognized that its rationale for creating these options applied equally to Article III judges, it did not extend these options to the judges. *See* pp. 4-6 *supra*; J.A. 70. As a result, as the trial court found, Article III judges "were unique among federal employees in seeing their take-home pay necessarily decrease by the amount of the Social Security tax." Pet. App. 50a.

2. The government seeks to justify Congress' decision to exclude judges from this statutory relief on the ground that judges were not subject to a "double imposition" for retirement, and that the effect of the statutes, therefore, was to "equalize" the incumbent employees' salary contributions for retirement. Pet. Br. at 39-40. This argument, however, ignores economic reality because it assumes that judges, unlike other existing employees, had not paid for their own retirement program. Pet. Br. at 39. Federal judges pay for their retirement benefits in the form of lower salaries (rather than receiving higher salaries with mandatory deductions). The 1985 AOUSC report, for example, specifically found that many judges "give up opportunities for much larger compensation," in part because the guarantee of a compensation during good behavior means that "[o]nce appointed, retirement income [is] no longer a factor in their financial planning." J.A. 121. After the 1983 Amendments, only judges bore the double imposition of lower salaries and OASDI taxes.

The government's contention that Congress' discrimination against federal judges is justifiable because it was

designed to keep federal employees "subject to only one imposition under federal law for retirement income security," Pet. Br. at 38, is equally erroneous. The Adjustment Act's interim plan for newly hired employees that took effect in 1984 did not eliminate CSRS in favor of OASDI coverage; new employees were subject to deductions for *both* systems. Opp. App. 2a, 4a; J.A. 64. Instead, Congress equalized the overall *economic* effect of adding OASDI coverage. New employees' deductions for CSRS were reduced with an offset in the amount of the OASDI deduction in order to match the total deduction level of pre-1984 employees. *Id.* Only incumbent officials (excluding judges) were allowed to completely replace participation in CSRS with participation in OASDI, and thus actually to reduce the level of their retirement deductions. Opp. App. 11a; J.A. 64-65. Therefore, in terms of the economic effect of salary deductions on federal employees, Congress retained the status quo for both pre-1984 employees and newly hired employees with two exceptions: (1) judges were subjected to increased salary deductions, and (2) a small number of incumbent officials were given the option to reduce, maintain, or increase their deductions, as they chose.[22] Only Article III judges, in short, had no ability to offset the economic impact of OASDI taxes, and no choice but to suffer an actual reduction in their take home pay. Pet. App. 50a.

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[22] Nothing in the text or legislative history of the Adjustment Act, the Deficit Reduction Act of 1984 and the FERS Act sets forth a rationale for the discriminatory treatment accorded Article III judges compared to other incumbent officials mandatorily added to OASDI. Thus, the contentions advanced by government counsel are simply "post-hoc rationalizations" for the discriminatory treatment accorded the judiciary. Given the fundamental constitutional principles at issue, this Court should reject any rationales, such as those being offered here, for discriminatory treatment that are not derived clearly from the statutes in question.

3. Congress specifically acknowledged that the effect of the 1983 Amendments was to impose a discriminatory economic burden on judicial compensation, and that judges who could not afford to bear this burden had no choice but to leave office. Congress found that the incumbent federal officials who were mandatorily added to OASDI and "are participants in a covered retirement system will be *double covered* effective January 1, 1984. The affected group includes the President and Vice President, Members of Congress . . . and judges." Conf. Rep. on Adjustment Act, H.R. Conf. Rep. No. 98-542, at 13 (emphasis added). Moreover, by changing the rules in the middle of the game, Congress left these officials with "no election other than to resign (which in many instances would involve resignations from elected offices, [and] lifetime judicial appointments)." *Id.*

Rather than remedy this discrimination, however, Congress compounded it by providing the affected officials, except Article III judges, with the ability to offset the economic impact of OASDI taxes. The 1985 AOUSC study found that the retirement plans of sitting Article III judges, which included "heavy financial commitments to provide benefits for their survivors," had been "severely impacted by the imposition of a substantial annual levy in the form of taxes imposed under the social security system, the centerpieces of which are an old-age benefit that most judges do not need and survivor benefits for which they made other arrangements." J.A. 121.[23] Far

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[23] The 1985 AOUSC report found that "[m]any judges do contribute 4½% of their salaries to the Judicial Survivors Annuity System, 28 U.S.C. 376," and that while these benefits "overlap social security benefits to some extent . . . Congress provided no relief from that aspect of the double deduction problem." J.A. 114. To be sure, when Congress increased the JSAS contribution rate in 1986, it gave participants a one-time option to opt out, Judicial Improvements Act of 1985, Pub. L. No. 99-336 § 2(c), 100 Stat. 633 (1986), but this "open season"

from eliminating the "double imposition" on judicial salaries, or "equalizing" the judges' economic contributions to retirement, the effect of the statutes at issue was to diminish the compensation of Article III judges in a discriminatory manner that placed the affected judges in a position in which their only options were to accept the diminution or leave office. The Constitution does not permit Congress to discriminate against judges in this manner.[24]

C. The Government Offers No Persuasive Reason Why the Diminution in the Respondents' Compensation Should Go Unremedied

Much of the government's brief is devoted to arguing that if the Court affirms the judgment below, it will be establishing a Compensation Clause precedent that is inconsistent with "[t]he text of the Constitution and [the] practicalities of tax administration." Pet. Br. at 29. The government's arguments, however, all relate to a holding that the Compensation Clause prohibits the imposition of a generally applicable, nondiscriminatory tax on all citizens. That question is not presented by this case. A holding by this Court that the Compensation Clause prohibits the extension of Social Security taxes to sitting

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was unrelated to OASDI coverage and did not provide judges with economic offsets that harmonized OASDI with JSAS contributions.

[24] The government's implicit suggestion that such discrimination is justified so long as it is ostensibly designed to achieve a salutary purpose (*e.g.*, "equalization") is untenable. First, a statute that has the effect of diminishing judicial compensation in a discriminatory manner will undermine the objectives of the Clause – particularly its objective in attracting able lawyers to the bench – regardless of Congress' intent. Second, as James Madison emphasized, Congress can easily "mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The Federalist No. 48 (James Madison).

Article III judges, or prohibits their discriminatory extension to sitting Article III judges, is perfectly consistent with the purposes and text of the Constitution, and would create no issues in the administration of the tax laws.

1. The government argues that a diminution in judicial compensation that results from the imposition of a tax can never be unconstitutional. Pet. Br. at 28. To hold otherwise, the government contends, would require the Court to embrace "implausible" readings of the Presidential Compensation Clause and the Twenty-Seventh Amendment, and to "freeze" the rates paid by judges at the time they accept their appointments. Pet. Br. at 29-32. Each of these contentions is erroneous.

a. The Presidential Compensation Clause prohibits both increases and decreases in the President's compensation during his term in office. U.S. Const. art. II, § 1, cl. 7. The government argues that this Clause should be read to allow increases in the President's compensation through the elimination of "*any* tax on the President's salary while he [is] in office." Pet. Br. at 30 (emphasis added). But surely the government does not contend that if Congress increased the President's compensation by granting relief from income taxes to the President alone, such an increase would be permissible under the Clause. The effect of such an action would be no different than increasing the President's stated salary. Nor, in light of the purposes of the Clause and this Court's decision in *Will*, could the government contend that this constitutional infirmity would be remedied if Congress extended this tax relief beyond the President to a small group of senior Executive Branch officials.

The same is true with respect to the government's argument concerning the Twenty-Seventh Amendment, which prohibits Congress from enacting laws that vary the compensation of its members until an election of Representatives has intervened. U.S. Const. amend.

XXVII. The government contends that this Amendment should not be read to prohibit Congress from imposing or repealing a tax until an election of Representatives has intervened. Pet. Br. at 31. But, again, the government surely does not contend that Congress could vary its own compensation by, for example, repealing the application of income taxes to its members alone. Nor could it contend that this constitutional infirmity would be remedied by simply extending the repeal to certain senior Executive Branch officials as well.

The extension of Social Security taxes to a small group of incumbent federal officials, including sitting Article III judges, reduced their compensation and their compensation alone. The effect of the various adjustment acts that followed was to leave sitting Article III judges as the only incumbent officials that suffered a reduction in take home pay as a result of these taxes. To affirm the judgment below that these acts were unconstitutional under the Judicial Compensation Clause would not require the Court to read the Presidential Compensation Clause or the Twenty-Seventh Amendment to prohibit the imposition or repeal of *any* tax on the President or Members of Congress. It would only suggest that these constitutional provisions be read to prohibit the imposition, extension or repeal of a tax as to the President or Members of Congress alone, or as part of a small group of federal officials.

On the other hand, if the Court accepts the government's contention that the term "compensation" as used in these various provisions of the Constitution means only the salary stated in law, it would be required to hold that the imposition, extension or repeal of a tax as to the President alone, or as to Members of Congress alone, would not violate the Presidential Compensation Clause or the Twenty-Seventh Amendment. Under this view, Congress would be free, for example, to impose a confiscatory tax on the compensation of the President alone. It

is, in short, the government's reading of the Constitution's text that is "implausible" and cannot be sustained. Pet. Br. at 31.

b. The government also contends that if compensation, as used in the Constitution, is read to mean "take-home pay net of income taxes," then the Judicial Compensation Clause must be read to prohibit "the raising of *rates* of income taxes on the salaries of sitting judges." Pet. Br. at 32. The government further contends that it may be difficult, as a practical matter, to distinguish between a "new tax and an increased income tax rate." Pet. Br. at 33. The government's argument, however, once again loses sight of the constitutional inquiry. Given the purposes of the Clause, the critical question is not how the diminution in compensation is accomplished, but whether the manner in which it is accomplished could induce judges to leave the bench.

In this case, the extension of Social Security taxes to sitting Article III judges had the same impact on the economic calculus those judges performed in deciding whether to accept their appointments as a diminution in their statutory salaries would have had: Both increase the economic incentive of sitting judges to leave the bench. In the case of an increase in tax rates, the critical constitutional question would be the same. A general increase in the level of federal income tax rates, for example, would not increase judges' incentive to leave the bench, as it would affect not only judicial compensation, but also what a judge could earn in non-judicial positions.

On the other hand, there are plainly circumstances in which an increase in the income tax rate paid by judges would be unconstitutional. The government made this point in its brief to this Court in *Will*. In arguing that there is no plausible constitutional distinction between "direct" and "indirect" diminutions in judicial compensation, the government correctly observed that "imposition of a higher income tax rate for government officials who

enjoy life tenure would raise serious problems under the Compensation Clause even though only an 'indirect' diminution would be involved." Brief for the United States at 67 n.55. This is because an increase in the rate of tax paid by judges, but not by those in non-judicial positions, would alter only one side of the economic calculus the judge performed in deciding to accept his or her appointment, and thereby increase the incentive of judges to leave the bench.

Affirming the judgment of the court below, therefore, would not require this Court to hold that Congress must "freeze" the rates of taxes paid by judges when they accept their appointments. It would only suggest that the Compensation Clause be read to prohibit an increase in the rate of tax on judicial compensation in the unusual event that this action had the effect of increasing the incentive of judges to leave the bench. On the other hand, if the Court were to accept the government's view that increases in the rate of tax on judicial compensation are never actionable under the Compensation Clause, it would be required to uphold a confiscatory increase in income tax rates that applied to judicial compensation alone. As the government recognized in its brief in *Will*, this interpretation of the Clause is untenable.

2. There is nothing in the Court's opinion in *Evans v. Gore*, nor in the government's attacks on that decision, that warrants reversal of the judgment below. *Evans* was clearly correct in holding that a diminution in judicial compensation accomplished by means of taxation may violate the Compensation Clause. Whether the Court correctly applied that fundamental principle to the tax at issue in *Evans* is irrelevant to this case, which involves a taxing statute that, in both operation and effect, undermines the purposes of the Compensation Clause in the same manner as a diminution in the judges' statutory salaries.

Nor does anything in this Court's post-*Evans* decisions warrant reversal of the judgment below. The government asserts that *Evans* is no longer good law because it "heavily relied" on a series of intergovernmental immunity decisions that the Court has subsequently repudiated. Pet. Br. at 22. This is inaccurate. The Court's decision in *Evans* is based principally on its careful study of the history and purposes of the Compensation Clause. Having reached what it termed the "obvious" conclusion based on that study that some diminutions "may be direct and others indirect, or even evasive as Mr. Hamilton suggested," the Court cited *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), to "illustrate" the general principle that a diminution in compensation may be accomplished by means of taxation. 253 U.S. at 254. Later in the opinion, the Court cited other intergovernmental immunity cases to demonstrate that, while "the taxing power is comprehensive and acknowledges few exceptions," such exceptions have been recognized. *Id.* at 255.

This Court and the lower courts have consistently acknowledged (as did the government in *Will*) that there are circumstances in which the imposition of a tax can diminish judicial compensation in a manner that violates the Compensation Clause. *See, e.g., O'Malley*, 307 U.S. at 282; *Atkins*, 556 F.2d at 1045. Moreover, while the Court has narrowed the scope of the intergovernmental immunity doctrine, it continues to recognize that there are circumstances in which the imposition of a tax by one government on another is unconstitutional. *See, e.g., South Carolina v. Baker*, 485 U.S. 505, 525 (1988) (intergovernmental tax immunity doctrine protects states from discriminatory taxation).[25]

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[25] The government also asserts that *Evans* has been undermined by Justice Holmes' dissent in that case, which was subsequently embraced in *O'Malley* and *Will*. Pet. Br. at 20-21.

There is, in short, no reason for the Court to revisit, much less overrule, *Evans* in this case. If the *O'Malley* Court had concluded, as the government now urges this Court to conclude, that under no circumstances could a tax on judicial compensation ever violate the Compensation Clause, it would have overruled *Evans* as well as *Miles v. Graham*, 268 U.S. 501 (1925). It did not. Nor did *Will*. Since *O'Malley*, *Evans* has been appropriately construed by this Court and the lower courts to be limited to the facts before it – *i.e.*, the imposition of a new tax on a sitting Article III judge. Indeed, the court of appeals here had no difficulty understanding that "[u]nder *Evans*, only judges who took office prior to the imposition of the new Social Security taxes suffered a diminution." J.A. 64a. The government's criticisms of *Evans* have no application to the facts of this case, which does not involve the imposition of a new, generally applicable, nondiscriminatory income tax on all citizens, and the government points to no other case in which the courts have even applied *Evans*, much less applied it in a manner that the government believes is inconsistent with the Constitution.

3. The government lastly argues that to affirm the judgment below, the Court would have to conclude that "Congress could not do in two steps what it could have done at one time." Pet. Br. at 34. This case illustrates why

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Neither Justice Holmes nor the *O'Malley* or *Will* Courts, however, suggested that the imposition of a tax can never constitute an unconstitutional diminution in judicial compensation. To the contrary, as the government acknowledges, the focus of Justice Holmes' dissent is simply on whether the tax at issue "single[s] out judicial compensation." Pet. Br. at 19. *O'Malley* and *Will* likewise focus on the question of whether the tax is "nondiscriminatory." *O'Malley*, 307 U.S. at 282; *Will*, 449 U.S. at 226. In this case, the tax statutes at issue not only operated to undermine the purposes of the Compensation Clause in the manner the Framers sought to prohibit, they also singled out judicial compensation for discriminatory treatment.

this is so. The reason the government sees no harm in Congress' extension of Social Security taxes to sitting Article III judges decades after its original enactment is because it casts a blind eye toward the purposes of the Compensation Clause. The Clause was designed to prohibit diminutions in judicial compensation that, like the statutes at issue here, alter only one side of the economic equation that judges employ in deciding whether to accept their appointments. Diminutions of this nature necessarily increase the economic incentive of judges to leave the bench, and simultaneously deter potential judges from accepting appointments, for fear that the political branches will, at some point in the future, alter the terms of their economic calculus.

III. SALARY INCREASES GRANTED TO THE ENTIRE JUDICIARY DID NOT REMEDY THE DIMINUTION

The government contends that even if the extension of Social Security taxes to sitting Article III judges resulted in unconstitutional diminutions in judicial compensation, the diminutions came to an end when Congress provided general salary increases to all Article III judges and other federal employees. As a result, the government argues, the plaintiff judges in this case are at most entitled to damages for the HI and OASDI withholding from the single paycheck they received at the beginning of January 1984 (for services performed in December 1983), since the general salary increases received by judges thereafter exceeded the amount of the HI and OASDI withholding.

1. The government does not dispute that all of the salary increases that Article III judges have received since 1983 were given to broader segments of the federal workforce, and that the purpose of these increases was primarily to remedy the effects of inflation on federal salaries.

See generally 28 U.S.C. 44 & 135 (1994 & Supp. IV 1998), Historical Notes (describing judicial salary increases). The government, therefore, does not dispute the Federal Circuit's conclusion that:

> In the general salary increases Congress has seen fit to grant the judiciary in the years since 1983, there is nothing to suggest that the congressional purpose was to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional imposition of the tax at issue in this case. On the contrary, everything in the record and the legislative history makes clear that these increases were in response to continued concerns expressed in Congress, within the judiciary itself, in the bar, as well as among segments of the informed public, concerns for the wellbeing and continued vitality of the federal judiciary if the slide in purchasing power resulting from continued and unadjusted-for inflation was not halted.

Pet. App. 124a (footnote omitted).

The government nevertheless contends that these general increases remedy the constitutional violation in this case. This contention can be rejected initially as a matter of statutory interpretation. The salary increases were not provided by Congress to compensate Respondents (or comparably situated judges) for the unconstitutional diminution in their compensation. The government cannot now highjack money that was specifically appropriated by Congress to remedy one problem and, by executive fiat, deem it to be a remedy for another problem. 31 U.S.C. 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.")

2. The government suggests that Congress' purpose in increasing judicial salaries is irrelevant to the constitutional inquiry – the only issue is whether the effect of the salary increase is to raise the judge's statutory salary

above the pre-diminution level. Even if this were correct, a general salary increase granted to the entire judiciary cannot remedy the unconstitutional diminution in this case because it does not place the Respondents in the same position they would have been in but for the unconstitutional diminution. *See, e.g., Milliken v. Bradley,* 418 U.S. 717, 746 (1974).

The basic problem with the government's position, as the Federal Circuit found, is that had there been no unconstitutional diminution in this case, the Respondents would have received and enjoyed the full benefit of the post-1983 salary increases. J.A. 122a-23a. It is undisputed, however, that they are not in this position today; the unconstitutional diminution has deprived them of the full benefit of the salary increases. To see this, consider the following example: On February 1, Congress decreases the salary of Judge A from the $100,000 statutory salary to $25,000 because it disagrees with a recent decision that he issued. Then, on March 1, Congress increases the salary of all federal judges, including Judge A, by $76,000, so that Judge A earns $101,000 and his colleagues earn $176,000. It is the government's position that, as of March 1, the Compensation Clause violation would be remedied.

But it would be a strange constitutional remedy indeed that does not seek to undo the effects of the constitutional violation. In this case, the effect of the rule advanced by the government is to leave the Respondents in essentially the same position they would have been in had they never filed suit. While the Respondents are certainly better off because of the general salary adjustments, it is also certain that these increases did not make them whole for the diminution they suffered and continue to suffer.

3. Contrary to the government's contention, this Court's decisions offer no support for its position on remedy. *Will* did not address the remedy issue *sub judice,*

but rather, simply stated in a footnote the nature of the relief sought by the plaintiffs in that case. *See* 449 U.S. at 206 n.3 & 209 n.6. Indeed, to the extent that *Will* is relevant at all, it supports the Respondents' position in this case. This Court's analysis of "Year 4" in *Will* demonstrates that the mere fact that a judge's salary is higher in a year than it was in the previous year does not mean that no diminution has occurred; the Court held that the statute at issue diminished the compensation of Article III judges even though the judicial salary in "Year 4" was 5.5 percent higher than it was in "Year 3." 449 U.S. at 230.

While *Will* offers the government no support, the factual circumstances surrounding *Evans v. Gore* flatly contradict the government's position. In *Evans*, the day after the income tax statute was enacted, Congress increased the compensation of district court judges from $6,000 to $7,500, and the compensation of circuit court judges from $7,500 to $8,500[26] – increases far in excess of the amounts paid by judges to the government as a result of the imposition of the income tax. (Judge Evans' claim for the 1918 tax year, for example, was for $276.47, plus interest at a rate of six percent annually until the date paid. *Evans v. Gore*, 262 F. 550 (W.D. Ky. 1919) (relief requested in petition; Transcript of Record at 6, 10 (Dec. 31, 1919)), *rev'd*, 253 U.S. 245 (1920). Nevertheless, this Court "invalidated application of the income tax to judges who had taken office prior to the tax." J.A. 59a. Although *Evans* does not discuss this point, the Justices of this Court were undoubtedly aware of the salary increases that had granted only a year before its decision.

If, as the government contends, *any* salary increase received by judges after the imposition of a new tax

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[26] Act of February 25, 1919, ch. 29, 40 Stat. 1156. *See also* Richard A. Posner, *The Federal Courts: Crisis and Reform* 348 (1985).

"cures" the diminution resulting from the tax, then Article III judges in *Evans* appointed prior to February 24, 1919 should have begun paying income taxes when their salaries increased on March 1, 1919. *O'Malley*, 307 U.S. at 280-82 & n.10, however, makes clear that this Court and Congress understood that *Evans* held the income tax to be invalid as applied to all sitting Article III judges for *all* tax years. *See also* 32 Op. Att'y Gen. 248 (1920) (opining that the salaries of judges appointed *after* the enactment of the income tax invalidated in *Evans* were taxable); Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Compensation*, 24 UCLA L. Rev. 308, 332 & n.94 (1976) ("Prior to 1939, federal judges were considered constitutionally exempt from income taxes.")..

4. Finally, the government argues that "[t]he effect of the court of appeals' ruling . . . is that Congress may never bring to an end a Compensation Clause violation caused by taxation of judicial salaries except by repealing the offending tax (or, perhaps, by granting the affected judges a special salary increase . . .)." Pet. Br. at 43. The implication that there would be some special difficulty remedying the violation in this case is erroneous. Prospectively, Respondents need only be granted by Congress the option whether or not to participate in Social Security – essentially the same as the option Congress gave 99% of pre-1984 federal civilian employees with respect to OASDI, and subsequently gave Senior Judges, as well as the option the AOUSC has already given the Respondents and similarly situated judges. Retrospectively, the Respondents seek precisely the same remedy sought by the *Will* judges, *i.e.*, damages for past diminutions in compensation. While such a remedy can certainly be provided by statute, the courts can provide that remedy as well. There is, in short, nothing unique or unusual required to remedy the unconstitutional diminution in this case.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

STEVEN S. ROSENTHAL
DOUGLAS A. TUCKER
NOEL J. FRANCISCO
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, NW
Washington, DC 20005
(202) 220-9600

W. STEPHEN SMITH*
VICTORIA A. TOMLINSON
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1500
*Counsel of Record

ELLEN E. DEASON
Associate Professor of Law
University of Illinois
503 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-1286